

DELIA BISUANO,
Plaintiff,
v.
CAROLYN W. COLVIN, Commissioner
of Social Security,¹
Defendant.

No. CV-12-00049-CI
ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for Summary Judgment. ECF No. 14, 17. Attorney Maureen J. Rosette represents Delia Bisuano (Plaintiff); Special Assistant United States Attorney Willy M. Le represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

¹Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to FED. R. CIV. P. 25(d), Carolyn W. Colvin is substituted for Michael J. Astrue as the Defendant in this suit. No further action need be taken to continue this suit. 42 U.S.C. § 405(g).

JURISDICTION

On December 8, 2008, Plaintiff filed a Title II application for a period of disability and disability insurance benefits, along with a Title XVI application for supplemental security income alleging disability in both claims beginning March 5, 2007. Tr. 17; 164-65. Plaintiff reported that she could not work due to "depression and memory problems" and these limited her ability to work because she felt "overwhelmed, depressed, it is hard to concentrate, cannot remember." Tr. 168. Plaintiff's claim was denied initially and on reconsideration, and she requested a hearing before an administrative law judge (ALJ). Tr. 83-130. A hearing was held on June 30, 2010, at which medical expert Ronald M. Klein, vocational expert K. Diane Kramer and Plaintiff, who was represented by counsel, testified. Tr. 34-81. ALJ Marie Palachuk presided. Tr. 34. The ALJ denied benefits on August 2, 2010. Tr. 17-24. The instant matter is before this court pursuant to 42 U.S.C. § 405(g).

STATEMENT OF THE CASE

The facts of the case are set forth in detail in the transcript of proceedings and are briefly summarized here. Plaintiff completed the tenth grade, and at the time of the hearing, she was 48 years old, four-foot eleven inches tall, and she weighed 174 pounds. Tr. 47-48. She was married and living in an apartment with her husband and one of her daughters. Tr. 333.

Plaintiff worked as a care giver for her mother, and when her mother moved into a rest home, Plaintiff stopped working. Tr. 169. Plaintiff reported that she used drugs for 24 years and when she stopped using in October 2007, she experienced pain, and she could not work because she "couldn't deal with people or depression." Tr.

1 169. Her previous jobs included working as a care giver to her
2 parents, janitorial work, and working at a clothing store. Tr. 49-
3 53.

4 Plaintiff said she experiences mood swings, and she has anxiety
5 and depression. Tr. 67. She said medication makes it worse. Tr.
6 67. Plaintiff testified that her low back and legs hurt. Tr. 59-
7 60. She said when she gets upset or eats, her stomach hurts and
8 "blows up like I'm four months pregnant." Tr. 61. She testified
9 she has headaches four to five times per week and she has to lie
10 down. Tr. 62. Plaintiff testified that the longest she can sit
11 without changing positions is thirty minutes, and she can stand for
12 about 15 to 20 minutes before she gets too tired. Tr. 63-64. She
13 said the only way for her to get up a staircase is to crawl. Tr.
14 65. Plaintiff said she had bladder problems, and she said she has
15 to urinate four to five times during the night, and when she coughs
16 or throws up, she leaks urine. Tr. 66. She said her physician
17 attributed this to her age. Tr. 66. Plaintiff said she sleeps or
18 is lying down most of the day every day, and she "[does not] want to
19 do anything." Tr. 63; 69. She said she does housework "once every
20 while" and that makes her tired. Tr. 69.

21 Plaintiff admitted that beginning in her teens, she started
22 using acid, cocaine, and eventually methamphetamine, and she abused
23 alcohol for many years. Tr. 255. She testified that she has been
24 clean since October 2007. Tr. 60.

25 ADMINISTRATIVE DECISION

26 At step one, ALJ Palachuk found that Plaintiff had not engaged
27 in substantial gainful activity since March 5, 2007. Tr. 19. At
28 step two, she found Plaintiff had the severe impairments of obesity

1 and malingering. Tr. 19. At step three, the ALJ determined
2 Plaintiff's impairments, alone and in combination, did not meet or
3 medically equal one of the listed impairments in 20 C.F.R., Subpart
4 P, Appendix 1 (20 C.F.R. § 416.920(d), 416.925 and 416.926). Tr.
5 21. The ALJ found Plaintiff has the residual functional capacity
6 ("RFC") to perform medium work with the following limitations: "The
7 claimant can only occasionally climb ramps, stairs, ladders, ropes
8 and scaffolds. She is limited to brief and superficial social
9 interaction with the public. She has sufficient attention and
10 concentration to understand, remember, and follow simple
11 instructions and perform simple tasks." Tr. 21. In step four
12 findings, the ALJ found Plaintiff's statements regarding pain and
13 limitations were not credible to the extent they were inconsistent
14 with the RFC assessment. Tr. 22. The ALJ concluded that Plaintiff
15 is capable of performing past relevant work, such as (1) home
16 attendant; (2) cleaner, industrial; and (3) bindery machine off-
17 bearer. Tr. 23.

18 STANDARD OF REVIEW

19 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
20 court set out the standard of review:

21 A district court's order upholding the Commissioner's
22 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
23 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
24 Commissioner may be reversed only if it is not supported
25 by substantial evidence or if it is based on legal error.
26 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
27 Substantial evidence is defined as being more than a mere
28 scintilla, but less than a preponderance. *Id.* at 1098.
Put another way, substantial evidence is such relevant
evidence as a reasonable mind might accept as adequate to
support a conclusion. *Richardson v. Perales*, 402 U.S.
389, 401 (1971). If the evidence is susceptible to more
than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of*

1 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

2 The ALJ is responsible for determining credibility,
3 resolving conflicts in medical testimony, and resolving
4 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
5 Cir. 1995). The ALJ's determinations of law are reviewed
6 *de novo*, although deference is owed to a reasonable
7 construction of the applicable statutes. *McNatt v. Apfel*,
8 201 F.3d 1084, 1087 (9th Cir. 2000).

9 It is the role of the trier of fact, not this court, to resolve
10 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
11 supports more than one rational interpretation, the court may not
12 substitute its judgment for that of the Commissioner. *Tackett*, 180
13 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
14 Nevertheless, a decision supported by substantial evidence will
15 still be set aside if the proper legal standards were not applied in
16 weighing the evidence and making the decision. *Browner v. Secretary*
17 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
18 substantial evidence exists to support the administrative findings,
19 or if conflicting evidence exists that will support a finding of
20 either disability or non-disability, the Commissioner's
21 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
22 1230 (9th Cir. 1987).

23 **SEQUENTIAL PROCESS**

24 The Commissioner has established a five-step sequential
25 evaluation process for determining whether a person is disabled. 20
26 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
27 137, 140-42 (1987). In steps one through four, the burden of proof
28 rests upon the claimant to establish a prima facie case of
entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.
This burden is met once a claimant establishes that a physical or
mental impairment prevents him from engaging in his previous

1 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a
2 claimant cannot do his past relevant work, the ALJ proceeds to step
3 five, and the burden shifts to the Commissioner to show that (1) the
4 claimant can make an adjustment to other work; and (2) specific jobs
5 exist in the national economy which claimant can perform. *Batson v.*
6 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).
7 If a claimant cannot make an adjustment to other work in the
8 national economy, a finding of "disabled" is made. 20 C.F.R. §§
9 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

10 ISSUES

11 The question presented is whether substantial evidence exists
12 to support the ALJ's decision denying benefits and, if so, whether
13 that decision is based on proper legal standards. Plaintiff argues
14 that the ALJ erred by failing to properly weigh the medical
15 evidence. ECF No. 15 at 13-15.

16 DISCUSSION

17 A. Kayleen Islam-Zwart, Ph.D.

18 Plaintiff contends that the ALJ failed to set forth specific
19 and legitimate reasons for rejecting Dr. Islam-Zwart's opinion. ECF
20 NO. 15 at 13-14. Plaintiff argues that contrary to the ALJ's
21 conclusion, the test administered by Dr. Islam-Zwart did not
22 indicate malingering, and the doctor opined that the invalid
23 portions were likely due to cognitive problems. ECF No. 15 at 13.

24 As a general rule, more weight should be given to the opinion
25 of a treating source than to the opinion of doctors who do not treat
26 the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995).
27 Where the treating doctor's opinion is not contradicted by another
28 doctor, it may be rejected only for "clear and convincing" reasons.

1 *Id.* Where the treating doctor's opinion is contradicted by another
2 doctor, the ALJ may not reject this opinion without providing
3 "specific and legitimate reasons" supported by substantial evidence
4 in the record. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.
5 1983). Where a medical source's opinion is based largely on the
6 Plaintiff's own subjective description of symptoms, and the ALJ has
7 discredited the Plaintiff's claim as to those subjective symptoms,
8 the ALJ may reject that opinion. *Fair v. Bowen*, 885 F.2d at 605;
9 and see *Diaz v. Sec'y of Health & Human Servs.*, 898 F.2d 774, 777
10 (10th Cir. 1990) (Commissioner appropriately discounted claimant's
11 nonexertional impairment complaints due to lack of corroborative
12 evidence and consulting physician's suspicion that claimant was
13 malingering). Also, an ALJ may discredit treating physicians'
14 opinions that are conclusory, brief, and unsupported by the record
15 as a whole, or by objective medical findings. *Batson*, 359 F.3d at
16 1195.

17 On May 22, 2009, Dr. Islam-Zwart examined Plaintiff and
18 completed a psychological/psychiatric evaluation form, along with a
19 narrative report. Tr. 318-36. Dr. Islam-Zwart noted that the
20 records related to Plaintiff's prior psychological testing were
21 incomplete:

22 According to records, Ms. Bisuano was tested with the WASI
23 on August 19, 2008 and achieved a full scale IQ of 85
24 using the abbreviated measure. However, there was a
25 significant discrepancy between her Verbal score of 77 and
26 her Performance IQ score of 95. Such a discrepancy is
27 often indicative of cognitive impairment; however, it is
28 difficult to make too many inferences without the original
testing materials. It does seem that a more thorough
evaluation might be in order (e.g., a WAIS, WMS, Category,
Achievement) to determine the extent of cognitive
difficulties and rule out learning disorders, especially
given her performance on the Trail Making Test and during
the evaluation generally.

1 Tr. 326. Dr. Islam-Zwart concluded that Plaintiff's "cognitive and
2 psychological problems are such that she is unable to work at this
3 time." Tr. 326.

4 The ALJ gave little weight to the opinion of Dr. Islam-Zwart
5 because he "failed to consider the many indications of malingering
6 and appeared to rely heavily upon the claimant's self-reporting."

7 Tr. 23. In this case, the ALJ's findings are supported by the
8 record. Dr. Islam-Zwart noted that in his examination, Plaintiff's
9 PAI responses were indicated that Plaintiff portrayed herself "in an
10 especially negative and pathological manner, possibly associated
11 with malingering. Given the potential for considerable distortion,
12 results could not be interpreted further." Tr. 333. Moreover, the
13 record contains significant evidence revealing several other
14 instances in which Plaintiff was suspected of malingering. See
15 e.g., Tr. 41-45; 258; 293-94. In light of the significant evidence
16 of Plaintiff's malingering, the ALJ's discounting of Dr. Islam-
17 Zwart's opinion because the doctor failed to appropriately consider
18 Plaintiff's lack of credibility was proper and supported by the
19 record.

20 **B. W. Scott Mabee, Ph.D.**

21 Plaintiff contends that the ALJ erred by giving no reason for
22 rejecting the opinions of Dr. Mabee. ECF No. 15 at 13. The ALJ did
23 not address the evaluation conducted by Shari Lyszkiewicz, LMHC, and
24 supervised by Dr. Mabee. The ALJ need not discuss all evidence
25 presented; rather, the ALJ need only explain why significant
26 probative evidence has been rejected. *Vincent v. Heckler*, 739 F.2d
27 1393, 1394-95 (9th Cir. 1984). On August 19, 2008, Shari
28 Lyszkiewicz, MS, LMHC, examined Plaintiff and completed a

1 psychological/psychiatric evaluation form, along with a narrative
2 report. Tr. 251-61. W. Scott Mabee, Ph.D., indicated he reviewed
3 the narrative report and believed that it complied with the
4 professional standards for psychological evaluation. Tr. 261. His
5 signature also appears on the evaluation form. Tr. 254.

6 Ms. Lyszkiewicz's narrative indicated that Plaintiff's Low
7 Average IQ would limit her job choices, but many positions existed
8 that she could perform. Tr. 257. Additionally, the report
9 concluded that Plaintiff was in "a transition period of giving up a
10 lifetime habit of drug use," and if she remained clean, "she should
11 be able to return to work in about three months." Tr. 261. On the
12 psychological/psychiatric evaluation form, Ms. Lyszkiewicz estimated
13 Plaintiff's functional limitations would last three months. Tr.
14 254.

15 The Social Security Act defines a disability as the "inability
16 to engage in any substantial gainful activity by reason of any
17 medically determinable physical or mental impairment which . . . has
18 lasted or can be expected to last for a continuous period of not
19 less than 12 months." 42 U.S.C. § 423(d)(1)(A). In this case, the
20 evidence presented by Dr. Mabee and Ms. Lyszkiewicz indicated
21 Plaintiff would be expected to return to work within three months.
22 As such, Plaintiff's condition did not fall within the definition of
23 "disability" for purposes of the Social Security Act. *Id.* As noted
24 above, the ALJ need only address why significant probative evidence
25 has been rejected. *Vincent*, 739 F.2d at 1394-95. As a result, the
26 ALJ was not required to discuss the opinion from Dr. Mabee because
27 it was not probative of a disability, as defined in the Social
28 Security Act.

1 **C. Diane Beernink, ARNP**

2 Plaintiff contends that the ALJ erred by failing to provide
3 reasons for rejecting Ms. Beerninck's opinion that Plaintiff is
4 limited to sedentary work. ECF No. 15 at 14-15.

5 In the Social Security disability context, nurse practitioners
6 are considered "other sources" and are not "acceptable medical
7 sources." See 20 C.F.R. § 404.1513(a),(d); accord 20 C.F.R. §
8 416.913(a),(d). Only acceptable medical sources may provide medical
9 opinions. See 20 C.F.R. § 404.1527(a)(2) ("Medical opinions are
10 statements from physicians and psychologists or other acceptable
11 medical sources that reflect judgments about the nature and severity
12 of your impairment(s), including your symptoms, diagnosis and
13 prognosis, what you can still do despite impairment(s), and your
14 physical or mental restrictions"); accord 20 C.F.R. § 416.927(a)(2).

15 Diane Beernink treated Plaintiff from March 4, 2008, to March
16 31, 2010. Tr. 272-89; 342-428. On September 12, 2008, Nurse
17 Beernink completed a physical evaluation form, and indicated that
18 Plaintiff's overall work level was sedentary. Tr. 262-65. The
19 diagnosis provided by Nurse Beernink was "fatigue," and she
20 explained: "her difficulty seems to be partly physical, she cannot
21 get up at 8 a.m., and also mental as the rush of customers
22 overwhelmed her." Tr. 264. Significantly, Nurse Beernink
23 concluded, "I cannot find any physical cause for her fatigue and
24 defer mental health assessment to a psychological health care
25 provider." Tr. 265.

26 The ALJ may reject a medical providers' opinion that is
27 contradicted by the provider's clinical notes and observations.
28 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). In this

1 case, Nurse Beerninck indicated Plaintiff should be restricted to
2 sedentary work due to fatigue, but the nurse acknowledged she could
3 not "find any physical cause" for Plaintiff's alleged fatigue. In
4 essence, Nurse Beerninck admitted she has no basis for limiting
5 Plaintiff to sedentary work. Moreover, in the absence of a physical
6 explanation for Plaintiff's alleged fatigue, she deferred to the
7 mental health providers who documented multiple instances of
8 affirmative evidence that Plaintiff was malingering. See Tr. 41-45;
9 258; 293-94. In light of the present circumstances, the nurse's
10 opinion that Plaintiff was limited to sedentary work does not
11 constitute significant and probative evidence of Plaintiff's
12 abilities. As such, the ALJ was neither required to address, nor
13 give reasons for rejecting this opinion. See *Vincent*, 739 F.2d at
14 1394-95.

15 Moreover, as Defendant points out, all of Plaintiff's mental
16 health doctors considered Plaintiff's fatigue and none identified
17 exertional limitations related to the alleged fatigue. Tr. 290;
18 295; 309; 311-13; 320; 325; 335. Under these circumstances, Nurse
19 Beerninck's unsupported assessment that Plaintiff is limited to
20 sedentary work was not material to determining Plaintiff's
21 disability and, thus, the ALJ was not required to specifically
22 address the opinion. The ALJ did not err.

23 CONCLUSION

24 Having reviewed the record and the ALJ's findings, the court
25 concludes the ALJ's decision is supported by substantial evidence
26 and is not based on legal error. Accordingly,

27 IT IS ORDERED:

28 1. Defendant's Motion for Summary Judgment, **ECF No. 17**, is

1 **GRANTED.**

2 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is
3 **DENIED.**

4 The District Court Executive is directed to file this Order and
5 provide a copy to counsel for Plaintiff and Defendant. Judgment
6 shall be entered for **DEFENDANT** and the file shall be **CLOSED.**

7 DATED August 2, 2013.

8
9 S/ CYNTHIA IMBROGNO
10 UNITED STATES MAGISTRATE JUDGE
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